

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re Case No. 04-19318-A-7F  
WILLIAM P. IRWIN DC No. SPD-5  
  
Debtor. FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE  
MOTION TO COMPEL TRUSTEE  
TO ABANDON PROPERTY OF ESTATE

A hearing was held October 5, 2005, on a motion to compel the trustee to abandon property of the estate. The moving party is Tracy Barry, liquidating trustee of the William P. Irwin and Jo Ann Irwin Revocable Living Trust ("Barry"). Opposition to the motion was filed by Thomas N. Ohanian, individually and as trustee for the Ralph Ohanian Revocable Living Trust (collectively "Ohanian").

Following the hearing, the court took the matter under submission. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A) and (O).

Background Facts.

William Irwin filed a chapter 7 case on November 3, 2004. He died on November 7, 2004. When William Irwin filed his bankruptcy case, he owned property located at 1441 Morris Avenue,

1 Fresno, California (the "Residence"). At the date the chapter 7  
2 case was filed, the Residence had a fair market value of  
3 \$425,000. The debtor claimed an exemption in the Residence of  
4 \$150,000 pursuant to California Code of Civil Procedure  
5 § 704.730(a)(3). As of the date the bankruptcy case was filed,  
6 the debtor owed \$188,647 on a note secured by a deed of trust  
7 against the Residence held by Bank of America and a total of  
8 \$17,482.92 secured by a tax lien against the Residence. As of  
9 the petition date, the Residence was further encumbered by  
10 judicial liens totaling in excess of \$300,000. A total of about  
11 \$656,129 in the consensual liens, the judgment liens, and the  
12 debtor's exemption meant that there was no equity in the  
13 Residence for the bankruptcy estate.

14 The chapter 7 trustee filed a report of no distribution on  
15 February 18, 2005, and the deadline to object to that report  
16 passed with no filings of objections by any party.

17 On July 11, 2005, the court entered an order granting Tracy  
18 Barry's motion to avoid judicial liens, avoiding the judicial  
19 liens of creditors Ohanian and Jim O'Neal against the Residence  
20 in their entirety and the judicial lien held by Richard Gunner  
21 and George Andros against the Residence partially to the extent  
22 that the principal and accrued prejudgment interest exceeded the  
23 sum of \$68,870.08. As a result of that lien avoidance order, the  
24 sum of the encumbrances against the Residence and the debtor's  
25 homestead exemption equals \$425,000, or the fair market value of  
26 the Residence. Therefore, there is no nonexempt equity for  
27 unsecured creditors.

28 The Residence is in more than normal disrepair due to

1 deferred maintenance.

2 Ohanian appealed from the order to avoid judgment liens.  
3 Ohanian also appealed from the court's order allowing Tracy Barry  
4 to substitute as real party in interest for the deceased debtor.  
5 Ohanian sought a stay in the bankruptcy court of the lien  
6 avoidance order pending the outcome of the appeal. Fed. R. Bankr.  
7 P. 8005. The court ordered a stay of limited duration. The  
8 court ordered a stay to be in effect until thirty days after any  
9 motion to abandon may be entered.

10 Legal Issues.

11 The propriety of abandonment.

12 Bankruptcy Code § 554(b) states that a party in interest may  
13 move the bankruptcy court to compel a trustee to abandon any  
14 property of the estate that is "burdensome to the estate or that  
15 is of inconsequential value to the estate." Here, the chapter 7  
16 trustee has not opposed the motion to abandon. At oral argument,  
17 the chapter 7 trustee stated that there is no equity for  
18 unsecured creditors. This is true whether Ohanian is successful  
19 in his appeal or not.

20 Does Ohanian's appeal divest this court of jurisdiction over  
21 the motion to abandon?

22 A timely filing of a notice of appeal divests the trial  
23 court over those aspects of the case involved in the appeal. In  
24 re Padilla, 222 F.3d 1184, 1190 (9<sup>th</sup> Cir. 2000). So, if the  
25 motion to abandon directly implicates the issues on appeal, then  
26 this court may have no jurisdiction to rule on the motion.

27 In Padilla, the United States Trustee moved to dismiss the  
28 debtor's petition for bad faith under Bankruptcy Code § 707(a).

1 The bankruptcy court granted the motion and dismissed the case.  
2 Padilla timely appealed to the Bankruptcy Appellate Panel. The  
3 Bankruptcy Appellate Panel reversed the order dismissing the  
4 petition and remanded the case for reinstatement. The trustee  
5 filed a notice of appeal to the Ninth Circuit. However, the  
6 trustee did not move to stay the BAP's judgment. The bankruptcy  
7 court then, having reinstated Padilla's bankruptcy case,  
8 proceeded with the bankruptcy, discharged Padilla's debts, and  
9 closed the case. The trustee did not object to the discharge.

10 The Ninth Circuit held that the timely filing of the appeal  
11 by the United States Trustee divested the bankruptcy court of  
12 jurisdiction to proceed with those aspects of the case involved  
13 in the appeal. This rule divesting lower courts of jurisdiction  
14 over those aspects of a case involved in an appeal is a judge-  
15 made doctrine. It is designed to avoid confusion and waste of  
16 time that might flow from putting the same issues before two  
17 courts at the same time. Id. (citations and internal quotations  
18 omitted). In Padilla, "the bankruptcy court's discharge of  
19 Padilla's debts and closure of the case drastically changed the  
20 status quo and amounted to a final adjudication of the  
21 substantial rights directly involved in the appeal." Id. Thus,  
22 the bankruptcy court lacked jurisdiction to proceed with the  
23 bankruptcy case during the appeal.

24 Here, Ohanian asserts that three issues on appeal may be  
25 implicated if the court grants the motion to abandon. Ohanian  
26 has raised as issues on appeal whether Barry has standing;  
27 whether the estate has an interest in the property; and whether  
28 Ohanian has no interest in the property because his lien has been

1 avoided.

2       However, Barry asserts that even if Ohanian were to win  
3 those issues on appeal, the property would still be burdensome  
4 and of inconsequential value to the estate.

5 Has Barry presented admissible evidence and has she met her  
6 burden of proof?

7       Property of the estate may be abandoned if it is burdensome  
8 of or inconsequential value to the estate. Under Bankruptcy Code  
9 § 704, the trustee should not take possession of assets that have  
10 no value to the estate or only have nominal value. Collier on  
11 Bankruptcy ¶ 704.02 (15<sup>th</sup> ed. Rev. 2004) at p. 704-6.

12       "Indeed, the legislative history of the Code made clear  
13 Congress' displeasure with prior practices under which  
14 trustees' administration of 'nominal asset cases' benefitted  
only the trustees themselves."

15 Id.

16       Ohanian asserts that the estate includes the interests of  
17 the secured creditors of the case. Ohanian refers to himself as  
18 a "stakeholder" in the estate. However, Ohanian is either a  
19 secured creditor (if he wins on appeal) or an unsecured creditor  
20 (if Barry wins the appeal).

21       Ohanian is correct that a trustee is a fiduciary to secured  
22 creditors in that the trustee has a duty to exercise reasonable  
23 care of properties of the estate that serve as collateral for  
24 secured claims. In re Pearson, 178 B.R. 753 (Bankr. C.D. Ill.  
25 1995). The bankruptcy court in Pearson went on to say:

26       "The chapter 7 trustee has two major roles. The first is to  
27 expeditiously liquidate the debtor's non-exempt assets, in a  
28 way that maximizes the return to the debtor's unsecured  
creditors. The second major role is an investigatory one.  
Beyond these few exceptions, the trustee takes the estate as

1 it exists on the date of the petition. The trustee's major  
2 goal is to try to produce an estate for the debtor's  
3 unsecured creditors, and the trustee will try to do so in  
4 several ways. The first and most obvious is to liquidate  
5 the debtor's non-exempt property that is not subject to  
6 liens. The second is to pursue causes of action belonging  
7 to the debtor. The third is to pursue the trustee's own  
8 causes of action to recover money or property under the  
9 trustee's avoiding powers."

10 Id. at 760-761 (internal quotations, ellipses and footnotes  
11 omitted).

12 The chapter 7 trustee's duties with respect to secured  
13 creditors are more limited.

14 "In addition to the statutory duties enumerated in 11 U.S.C.  
15 § 704 the chapter 7 trustee is considered to be a fiduciary  
16 of the secured creditors with the duty to exercise  
17 reasonable care as custodian of the properties which serve  
18 as collateral for the secured claims. . . . It is a  
19 fundamental concept in bankruptcy that a trustee's primary  
20 duty is to the unsecured creditors rather than to the  
21 secured creditors. The secured creditors, for the most  
22 part, should be able to look to their collateral for  
23 satisfaction of their claims. If there is no equity in the  
24 collateral for the bankruptcy estate or if the property is  
25 burdensome to the estate, the trustee generally abandons the  
26 property pursuant to 11 U.S.C. § 554(a). . . . A Chapter 7  
27 Trustee should not act as a mere conduit for the benefit of  
28 secured creditors only."

1 Id. at 761 (citations, internal quotations and brackets omitted).

2 So, for purposes of § 554(b), benefit to the estate means  
3 benefit to the unsecured creditors.

#### 4 Conclusion.

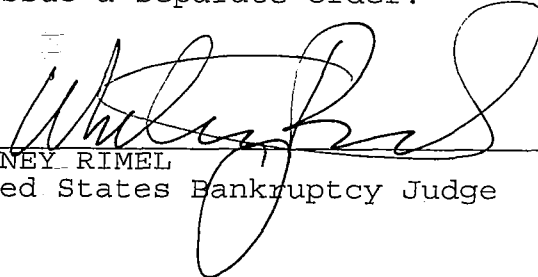
5 In the court's view, the issues on the motion to abandon are  
6 very different from the issues on appeal. Regardless of the  
7 outcome of the appeal, there will be no property in the estate  
8 for the trustee to administer. The Residence has no excess  
9 equity available for unsecured creditors. No one has challenged  
10 the exemption claimed by the debtor when the case was filed. The  
11 only question is whether the Ohanian judgment lien should remain

1 as an encumbrance against the Residence.

2 The only benefit of not granting the motion to abandon would  
3 be to Ohanian in that he would not be put to the task of seeking  
4 a further stay of the order avoiding his lien. There would be no  
5 benefit to unsecured creditors.

6 For the above reasons, the motion to compel abandonment will  
7 be granted. The court will issue a separate order.

8 DATED: January 12, 2006.

9  
10   
11 WHITNEY RIMEL  
12 United States Bankruptcy Judge  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA            )  
   )  
 COUNTY OF FRESNO            )    ss.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2656 U.S. Courthouse, 1130 O Street, Fresno, California, 93721.

On January 12, 2006, I served the within document on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California, addressed as follows:


Stephen P. Drobny, Esq.  
 McCormick, Barstow, Sheppard,  
           Wayte & Carruth  
 P. O. Box 28912  
 Fresno, California 93729-8912

Bruce Leichty, Esq.  
 625-A Third Street  
 Clovis, California 93612

James Edward Salven  
 Chapter 7 Trustee  
 P. O. Box 25970  
 Fresno, California 93729

Jeffrey J. Lodge, Esq.  
 Office of the United States Trustee  
 1110 U. S. Courthouse  
 1130 O Street  
 Fresno, California 93721

I certify (or declare), under penalty of perjury, that the foregoing is true and correct. Executed on January 12, 2006, at Fresno, California.

  
 Kathy Torres, PLS